Grandvision Enterprise Sdn Bhd v Ng Siok Hooi (P)

HIGH COURT (TEMERLOH) — ORIGINATING SUMMONS NO 24–124 OF 2006
SURAYA OTHMAN J
26 DECEMBER 2007

Evidence — Burden of proof — Fraud — Purchase of land — Allegation of fraud against purchaser — Whether actual fraud must be proved — Whether suspicion of fraud sufficient to create caveatable interest

Land Law — Restraint on dealings — Caveats — Application for removal of — Claim for profit share of land developed into housing project — Whether registrable interest under s 323(1)(a) of the National Land Code — Whether caveatable interest

Land Law — Restraint on dealings — Caveats — Trust caveat — Whether defendant should have entered a trust caveat instead of private caveat — National Land Code s 333

The defendant was one of the beneficiaries of the estate of Ng Tiow Soon ('estate'). The estate owned, inter alia, 35 pieces of lands, which were developed into housing project called Taman Tiow Soon Project ('the said project'). By a settlement agreement dated 5 September 1996, one Ng Kim Tin acquired the said lands from the administrators of the estate and the said lands were subsequently sold to the plaintiff. The plaintiff was then registered as the proprietor of the said lands. On 10 July 1998, one of the administrators of the estate, Ng Kim Seng, was ordered by the Temerloh High Court to pay the defendant her share of the profit of the said project. On 8 November 2005, the defendant entered caveats on all 35 pieces of the said lands on the ground that she as a beneficiary of the estate was entitled to receive her share of the profit of the said project. The plaintiff filed an application pursuant to s 327 of the National Land Code ('NLC') to remove all the 35 private caveats entered by the defendant.

Held, allowing the plaintiff's application:

(1) The claim of the defendant was for 2/7 profit share of the said project.

A The claim was a personal claim or an in personam claim. Following the authorities, a claim for profit is not a registrable interest under s 323(1)(a) of the NLC. The defendant's claim was obviously an in personam claim and therefore had no cavetable interest (see paras 9 & 15).

B (2) The defendant in the uncompleted administration of the estate of Ng Tiow Soon, had no caveatable interest against the plaintiff. The plaintiff bought the land some ten years ago and was not involved in the dispute between the defendant and her brothers. The defendant's recourse C therefore was against her brothers and not the plaintiff who was the registered proprietor of the said lands (see para 19).

(3) Under such circumstances, the defendant should have lodged a private caveat for her interest on the so called 'trust', ie, the defendant should have complied with the provisions of the NLC by lodging a trust caveat D under s 333. In this case the defendant did not lodge a trust caveat and neither did she state the issue of breach of trust by her brothers in Form 19B and its statutory declaration. Thus, the private caveat should be removed (see paras 22 & 24).

E (4) There was no evidence at all that the plaintiff had committed actual fraud in the purchase of the said lands from Ng Kim Tin. Suspicion on the part of the defendant was no proof of fraud. The defendant's submission was totally devoid of merit as the defendant's allegations were merely based on her imaginary but groundless suspicion. F The defendant had failed to prove fraud and the issue of lifting of the corporate veil and constructive trust were too remote in proving the defendant's caveatable interest (see para 29).

[Bahasa Malaysia summary

G

Defendan adalah salah seorang benefisiari harta pusaka Ng Tiong Soon ('harta pusaka'). Harta pusaka yang dimiliki, antara lain, 35 bidang tanah, yang telah dimajukan sebagai projek perumahan yang dipanggil Projek Taman Tiow Soon ('projek tersebut'). Melalui satu perjanjian penyelesaian H yang bertarikh 5 September 1996, Ng Kim Tin telah memperolehi tanah tersebut daripada pentadbir harta pusaka dan tanah tersebut kemudiannya telah dijual kepada plaintif. Plaintif kemudiannya didaftarkan sebagai tuan punya tanah tersebut. Pada 10 Julai 1998, pentadbir harta pusaka, Ng Kim Seng telah diperintahkan oleh Mahkamah Tinggi Temerloh untuk membayar I defendan keuntungan bahagiannya bagi projek tersebut. Pada 8 November 2005, defendan telah memasukkan kaveat ke atas kesemua 35 bidang tanah tersebut atas alasan bahawa beliau sebagai benefisiari harta pusaka tersebut adalah berhak untuk menerima bahagiannya daripada keuntungan projek tersebut. Plaintif telah memfailkan permohonan menurut s 327 Kanun

Tanah Negara ('KTN') untuk mengeluarkan kesemua 35 kaveat persendirian yang telah dimasukkan oleh defendan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Tuntutan defendan adalah untuk syer keuntungan 2/7 daripada projek tersebut. Tuntutan tersebut adalah tuntutan peribadi atau tuntutan in personam. Berikutan autoriti-autoriti, tuntutan bagi keuntungan bukan kepentingan yang boleh didaftarkan di bawah s 323(1)(a) KTN. Tuntutan defendan adalah jelas satu tuntutan in personam dan oleh itu tidak mempunyai kepentingan yang boleh dikaveatkan (lihat perenggan 9 & 15).

(2) Defendan di dalam pentadbiran harta pusaka Ng Tiow Soon yang tidak lengkap, tidak mempunyai kepentingan yang boleh dikaveatkan terhadap plaintif. Plaintif telah membeli tanah tersebut kira-kira 10 tahun lalu dan tidak terlibat dengan pertikaian di antara defendan dan saudara-saudara lelakinya. Jalan keluar bagi defendan oleh itu adalah terhadap saudara-saudara lelakinya dan bukannya plaintif yang mana adalah tuan punya berdaftar tanah tersebut (lihat perenggan 19).

(3) Di bawah keadaan tersebut, defendan sepatutnya memasukkan kaveat persendirian untuk kepentingannya terhadap yang dikatakan 'amanah', iaitu, defendan sepatutnya mematuhi peruntukan KTN dengan memasukkan satu kaveat amanah di bawah s 333. Dalam kes ini defendan tidak memasukkan kaveat amanah dan juga tidak menyatakan isu kemungkiran amanah oleh saudara-saudara lelakinya dalam Borang 19B dan akuan berkanunnya. Oleh itu, kaveat persendirian sepatutnya dipotong (lihat perenggan 22 & 24).

(4) Tidak terdapat langsung keterangan bahawa plaintif telah melakukan penipuan sebenar dalam pembelian tanah tersebut daripada Ng Kim Tin. Kesangsian terhadap defendan bukan bukti penipuan. Hujahan defendan langsung tidak bermerit kerana dakwaan defendan hanyalah berdasarkan kepada khayalan kesangsian yang tidak berasas. Defendan telah gagal untuk membuktikan penipuan dan isu mengangkat tabir perbadanan dan amanah konstruktif tiada kaitan dalam membuktikan kepentingan boleh kaveat defendan (lihat perenggan 26).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

For cases on fraud, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 468–469.

Cases referred to

Assets Company Ltd v Mere Roihi [1905] AC 176 (refd)
Dusun Desaru Sdn Bhd (No 2) & Anor v Wang Ah Yu & Ors [2000] MLJU 609 (refd)
EM Buxton & Anor v Packaging Specialists Sdn Bhd [1987] 1 MLJ 342 (refd)
Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 6 (refd)
Khoo Cheng Hee v Khoo Teng Seong & Ng Seng Kiok & Ors [1992] CLJ 643 (refd)
Lee Ah Thaw & Anor v Lee Chun Tek [1978] 1 MLJ 173 (refd)
Murugappa Chettiar Laksamanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1 (refd)
Wong Kuan Tan & Gambut Development Sdn Bhd [1984] 2 MLJ 113 (refd)
Zinma Housing Development Sdn Bhd v Soon Kow Sin @ Soon Kwang Shing [2002] MLJU 482 (refd)

Legislation referred to

National Land Code ss 323, 323(1)(a), 323(1)(b), 327, 329(2), 333, Form 19B

Tan Chap (Tan Chap & Associates) for the plaintiff.
Harwinder Kaur (AJ Ariffin, Yeo & Harpal) for the defendant.

Suraya Othman J:

INTRODUCTION

[1] The plaintiff in it's originating summons (encl 4) applied to this court under s 327 of the National Land Code (Act No 56 of 1965) ('NLC') to remove all the 35 private caveats entered by the defendant on 35 pieces of lands ('the said lands') owned by the plaintiff. During the hearing of the application the defendant has removed 29 caveats and only 6 caveats were left.

[2] The plaintiff's applications prayed for are as follows:

(a) the 35 private caveats to be removed;

(b) the defendant to pay the plaintiff damages due to the loss incurred due to the entry of the said caveats and the damages to be assessed by the Registrar;

(c) a declaration that the defendant has abused the private caveat process under the NLC and the defendant or its agent is prohibited from entering any further private caveats upon the said lands;

(d) the defendant to pay cost of this application; and

(e) other further reliefs the court thinks fit.

The chronology of events by the plaintiff are as follows

(a) On 13 January 1972, Ng Han Seng and Ng Kim Seng were appointed as administrators of the estate of Ng Tiow Soon (deceased).

(b) On 5 September 1996, by a settlement agreement and power of Attorney Ng Kim Tin acquired the said 35 pieces of lands in Mukim Pedah, Daerah Jerantut, Pahang ('the said lands') from Ng Han Seng & Ng Kim Seng ('the administrators').

(c) On 9 November 1996, the plaintiff purchased the said lands from Ng Kim Tin for a price of RM2.1m; the said lands were registered in the plaintiff's name. Plaintiff, became the registered proprietor of the said lands.

(d) On 20 December 1996, Ng Siok Hooi ('the defendant') entered the first caveat on 5 pieces of the said lands.

(e) On 8 July 1997, the defendant entered a second caveat on a piece of the said lands.

(f) On 19 November 1997, the defendant entered a third caveat on a piece of the said lands.

(g) On 17 February 1998, the first and second caveat were ordered to be removed by the Temerloh High Court.

(h) On 10 July 1998, Ng Kim Seng was ordered by the Temerloh High Court to pay the defendant her share of the profit of the development project known as Taman Tiow Soon ('the said project').

(i) On 6 July 1999, a third caveat was ordered to be removed by the Temerloh High Court.

(j) On 8 November 2005 the defendant entered a fourth caveat on all 35 pieces of the said lands by Forms 19B dated 8 November 2005 on the ground that she as a beneficiary of the estate is entitled to receive her share of the profit of the said project which she did not receive.

(k) On 13 July 2006, the plaintiff filed this originating summons to remove all the caveats.

The chronology of events by the defendant are as follows

(a) The beneficiaries to the Ng Tiow Soon (deceased) estate are the

defendant's brothers, Ng Han Seng ('NHS'), and Ng Kim Seng (NKS') ('the administrators'), Ng Kim Tin ('NKT'), Ng Kim Chuan ('NKC'), Ng Siok Hooi ('the defendant') and Ng Siok Wah ('the defendant's sister').

(b) On 13 January 1972, Ng Han Seng and Ng Kim Seng were appointed as administrators of the estate of Ng Tiow Soon (deceased).

(c) On 20 May 1970, the defendants brothers entered into a first distribution agreement, ignoring the defendants.

(d) On 10 June 1972, the defendants brothers entered into a second agreement to develop Lot 783, Mukim Pedah Jerantut into a housing project ('the said lands').

(e) For the housing project, the administrators incorporated a company called Taman Tiow Soon Sdn Bhd, and subdivided the said lands into 96 lots ('the said project'). 41 lots were sold, but 55 lots remained registered in the administrators' name.

(f) On 2 January 1987, the Kuala Lumpur High Court granted Ng Kim Tin a judgment, inter alia, for a declaration that the administrators were holding an undivided ½ share of the 55 unsold lots as trustees for him, they were also holding his share of the profits in the housing project as his trustees, and they had to transfer ¼ undivided share in the 55 unsold lots to him.

(g) On 5 September 1996, Ng Kim Tin, Ng Kim Seng, his son and Ng Kim Chuan entered into a settlement agreement and power of attorney granting all the rights and powers in the said project to Ng Kim Tin. They also incorporated a company known as Skyline Projects (M) Sdn Bhd, ('Skyline').

(h) On 10 July 1998, Ng Kim Seng was ordered by the Temerloh High Court to pay the defendant her share of the profit of the said project.

(i) On 8 November 2005, the defendant lodged caveats on the said lands to protect her rights and any subsequent development carried out by plaintiff using the said profits.

The issues raised by the plaintiff are as follows

[3] Form 19B is defective for the following reasons:

(a) There are no allegation against the plaintiff the registered proprietor;

(b) The defendant caveated on the whole said lands and not 2/7 undivided share thereof;

(c) The allegation in the affidavit is inconsistent to those made in Form 19B and its statutory declaration; and

(d) Res judicata.

(a) *There are no allegation against the plaintiff the registered proprietor*

The plaintiff submitted that there is no claim made against the plaintiff as the registered landowner in Form 19B and its accompanying Statutory Declarations. Thus the caveats on the said lands are frivolous and vexatious and should be removed without trial.

(b) *The defendant caveated on the whole said lands and not 2/7 undivided share thereof*

The plaintiff submitted that the defendant claimed 2/7 undivided share of the profit of the said project. However the defendant caveated all 35 pieces of the said lands and for the whole share of the said lands. Moreover the defendant has not shown how the portion of 2/7 is derived from.

(c) *The allegation in the affidavit is inconsistent to those made in Form 19B and its statutory declaration*

The plaintiff submitted that there was no allegation made against the plaintiff in Form 19B, ie no fraud was mentioned, no issue of lifting of the corporate veil, no issue of breach of trust, no mention of the role of Ng Kim Tin and no issue of the plaintiff as agent for the defendants' brothers was stated.

Since no such allegations were made in Form 19B, the plaintiff submitted that the caveats should be removed or alternatively all the allegations be expunged from the defendants' affidavit.

The plaintiff also submitted that there was no actual fraud but only suspicion of fraud and that the requirement in the NLC is actual fraud and not constructive fraud.

(d) *Res judicata*

The plaintiff submitted that the repeated lodgments of the private caveats by the defendant were not only frivolous, vexatious, abuses of caveat process but also tantamount to contempt of court and res judicata thus should not be entertained at all.

The plaintiff submitted that as the plaintiff (or caveatee) is the registered proprietor of the said lands, it is for the defendant as a caveator to begin the case to satisfy the court that the defendant has caveatable interest and that the caveat shall be extended pending the outcome of the action for specific performance.

The issues raised by the defendant are as follows

(a) The plaintiff's incorporation is a sham.

(b) The plaintiff is a constructive trustee owing the defendant equitable and fiduciary duties.

(a) *The plaintiff's incorporation is a sham*

The defendant submitted that the plaintiff was incorporated as a vehicle of fraud and the plaintiff's corporate veil ought to be lifted in order to do justice particularly where an element of fraud is involved. By lifting the corporate veil it will be evident that the plaintiff and her brothers through their shareholding in Skyline are similar entities run and controlled by Ng Kim Tin, Skyline and the plaintiffs directors.

(b) *The plaintiff is a constructive trustee owing the defendant equitable and fiduciary duties*

On the issue of constructive trust, the defendant submitted that since NKT assumed all the duties of the administrators through the power of attorney and settlement agreement and these duties were transferred to the plaintiff when it purchased the housing project ('the said project') constructed on the 'trust property' ('the said land'), this makes the plaintiff a constructive trustee owing the defendant equitable and fiduciary duties.

The defendant further submitted that the defendant and NSW's interest in the said lands must be protected. The defendant caveated only 6 out of 42 lots of the said lands which are bare, undeveloped, unencumbered and which is equivalent to her 2/7th share. The defendant refers to s 323(1)(b) of the NLC which enables the entry of a caveat by any person to be beneficially entitled under any trust property affecting any such land.

The plaintiff's reply

[4] The plaintiff submitted that the defendant's entitlement in the profit of the development of the said lands (in monetary claim) is different from the entitlement to the said lands itself. The former entitlement is of a personal claim in nature which is enforceable against Ng Kim Seng alone but not enforceable on the said lands itself. Thus the plaintiff submitted that when the defendant referred to the 'Trust Property', the defendant merely referred to the monetary claim (in personam) in the defendant's entitlement of the said profit in the said project. The defendant's entitlement to the said profit is not a registrable interest under s 323 of the NLC and hence it has no caveatable interest.

[5] The plaintiff submitted that the defendant should have complied with the provisions of the NLC by lodging a trust caveat under s 333 of the NLC.

JUDGMENT OF THE COURT

[6] The law on the entry of private caveat is found in s 323 of the NLC which state as follows:

323 Applications for entry of private caveats

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any *registrable interest* in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be *beneficially entitled under any trust* affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bond the land itself or an undivided share in the land or a particular interest only.

(3) Any application under this section shall be accompanied by —

(a) the prescribed fee;

(b) the grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and

(c) if relating to a part of the land, a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof a description, which is sufficient for identification.

[7] From the submissions and affidavits filed by the parties concerned, the main issue to be considered by this court is *whether the defendant has caveatable interest in the said lands.*

[8] In *Murugappa Chettiar's Laksamanan v Lee Teck Mook* [1995] 1 MLJ 782, His Lordship Gopal Sri Ram said that (at pp 788–189):

The principles formulated in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 as applied to the present appeal require an investigation into the following matter:

(1) *whether the respondent (caveator), on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest*;

(2) if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried; and

(3) if the first two questions are resolved in the respondent's favour, then whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. (Emphasis added.)

In our present case, has the defendant disclosed a caveatable interest?

[9] The claim by the defendant is for her 2/7 profit share of the Taman Tiow Soon Project ('the project'). This claim is a personal claim or better known as an in personam claim.

The question then arose is whether a personal claim is caveatable

[10] In the case of *Dusun Desaru Sdn Bhd (No 2) & Anor v Wang Ah Yu & Ors* [2000] MLJU 609, His Lordship Abdul Malik Ishak judge explained the concept of caveatable interests as follows:

> ... it (s 323 of the NLC) set out the categoris of persons or bodies who may enter private caveats. Precisely put, *not every person or body can enter a private caveat; only a person or body having a caveatable interest in the land is entitled to lodge a private caveat*. It is a correct statement of the law to state and I so state that *a person or body who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest.*
>
> ... Seen in its correct prospective and applying the Torrens principles, the phrases '*title to*' and '*registrable interest*' as employed in s 323(1)(a) of the NLC would refer to the following scenarios:
>
> (i) a claim to *an ownership of the land* as envisaged in the case of *Muna v Fatimah* [1968] 1 MLJ 54 and this kind of claim is capable of being protected by a private caveat; and
>
> (ii) a claim to a registrable interest which is capable of being protected by a private caveat.

A personal claim or better known as an in personam claim is enforceable against the registered proprietor and not the land itself and consequently it is not caveatable. In rem claim which relates to an interest capable of registration can be caveated (see *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97). (Emphasis added.)

[11] In the case of *EM Buxton & Anor v Packaging Specialists Sdn Bhd* [1987] 1 MLJ 342, the caveator had initially agreed to purchase the caveated land but later defaulted and in that event the deposit was forfeited. The caveator simply refused to continue with the contract and the caveator argued that the deposit ought not to be forfeited and he sought the return of the deposit in question. The proprietor of the land, on the other hand, was interested in removing the caveat and it was argued that the caveator had no caveatable interest. Her Ladyship Siti Norma Yaacob (as she then was) commented (at p 344):

... seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is not claiming specific performance of the agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only *to seek a refund of the deposit and other expenses incurred. To that end, it cannot be said that it had any interest in the land capable of being registered. As the only persons who can lodge a caveat are those entitled to obtain a title or interest in land and since the respondent has demonstrated that it was no longer interested to acquire such interest, it cannot insist that the caveat be allowed to remain. From the nature of its civil suit, the respondent has only a claim in personam against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim.* Admittedly, such a claim originated from the agreement but it is not capable of being registered under our Torrens system of registration. (Emphasis added.)

[12] In *Wong Kuan Tan & Gambut Development Sdn Bhd* [1984] 2 MLJ 113 the Federal Court held that:

(2) The appellant *did not have a 'caveatable interest'* in the land.

(a) The expression 'interest' in cl 4(a) of the deed of assignment was regarding an *unsecured civil debt and did not come within the meaning of 'interest'* in s 320(1) of the Code. The right given in cl 4(a) was a contractual right which did not create an 'interest' within the meaning of s 323 of the Code. *It did not amount to an equitable or other interest sufficient to support a caveat* ...

(Emphasis added.)

[13] In *Zinma Housing Development Sdn Bhd v Soon Kow Sin @ Soon Kwang Shing* [2002] MLJU 482, it was stated that:

> ... What the defendant had sought the private caveat to protect was his *entitlement to a certain number of units of completed houses that arose under the joint venture agreement*. Such right can properly be termed as contractual right which does not amount to an equitable or other interest sufficient to support a caveat under s 323(1) of the NLC.
>
> (Emphasis added.)

[14] In the light of all these authorities, can the defendant's claim against the plaintiff as registered proprietor be deemed as caveatable? Pursuant to the order dated 10 July 1998 vide Temerloh High Court OS 24–152 of 1997, the defendant herein (or the plaintiff in the aforesaid matter) is entitled to 2/7 share over the profit of the Taman Tiow Soon project. The reason for entering the 35 caveats on the said lands by defendant is similar, that is, the defendant did not receive her share of the profit of the Taman Tiow Soon project from Ng Kim Seng.

[15] A claim for profit is not a registrable interest under s 323(1)(a) of the NLC. It is obviously an in personam claim and therefore has no caveatable interest.

[16] The next question for the court to consider is whether a claim of residual beneficiaries is caveatable? ie, whether the defendant as beneficiary for the estate of Ng Tiow Soon has caveatable interests on the said land? In *Lee Ah Thaw & Anor v Lee Chun Tek* [1978] 1 MLJ 173 (FC), it was held that:

> the appellant as residuary beneficiaries did not have a caveatable interest in the lands since the administration of the estate was incomplete and the residue was uncertained.

[17] This case was followed by *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1. It was held that:

> Under s 323(1) of the NLC since there was trust for conversion in the will and the appellant being a residuary beneficiary in the deceased estate, the administration of which was still incomplete, he had no caveatable claim to title or registrable interest in the eight parcels of the land.

[18] Refer also to *Khoo Cheng Hee v Khoo Teng Seong & Ng Seng Kiok & Ors* [1992] CLJ 643.

[19] From the authorities above, the defendant in the uncompleted administration of the estate of Ng Tiow Soon, has no caveatable interest against the plaintiff. The plaintiff bought the land some ten years ago and is

not involved in the dispute between the defendant and her brothers. The defendant's recourse therefore is against her brothers and not the plaintiff who is the registered proprietor of the said lands.

[20] The defendant also contended that she is beneficially entitled under s 323(1)(b) of the NLC. This is so because NKT assumed all duties of the administrators through the power of attorney and settlement agreement and these duties were transferred to the plaintiff when it purchased the housing project ('project') constructed on the 'trust property' ('lands') and this makes the plaintiff a constructive trustee owing the defendant equitable and fiduciary duties.

[21] The defendant further submitted that the defendant has a 2/7 beneficial interest/proprietary right in the trust property pursuant to s 323(1)(b) of the NLC as she is:

> (b) any person or body claiming to be *beneficially entitled* under any *trust* affecting any such land or interest.

[22] This court feels that under such circumstances, the defendant should have lodged a *private caveat* for her interest on the so called '*trust*', ie, the defendant should have complied with the provisions of the NLC by lodging *a trust caveat* under s 333. In *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6 at p 7 it was held that:

> When a beneficiary under a trust enters a private caveat instead of a trust caveat and fails to state in his statutory declaration the existence of that trust, he is said to be guilty of his conduct. The private caveat ought to be removed.

[23] In this case the defendant did not lodge a trust caveat and neither did she state the issue of beach of trust by her brothers in Form 19B and its statutory declaration. She only stated in para 4 of 'the Statutory Declaration' that:

> *Pentadbir harta pesaka (iaitu abang-abang kepada defendant, Ng Han Seng dan Ng Kim Seng) telah menguruskan skim perumahan atas harta pesaka si mati, tetapi kami sebagai benefisiari-benefisiari tidak mendapat kongsi keuntungan yang sepatutnya.*

[24] Therefore in such circumstances the private caveat should be removed.

[25] On the issue of fraud, there was no allegation of fraud, conspiracy to defraud or otherwise at all made against the plaintiff in Form 19B.

[26] It is also trite law that the fraud committed if any must be actual fraud and cannot be constructive fraud as alleged by the defendant. In *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, His Lordship Abdul Hamid FJ (as he then was) held at p 84 that:

> The cardinal principal of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

[27] Gill CJ (Malaya), delivering the judgment of the court relying on *Assets Company Ltd v Mere Roihi* [1905] AC 176 at p 84 stated thus:

> But it is clear that *'fraud' within the meaning of the National Land Code means actual fraud and not what is known as constructive or equitable fraud.* (See *Assets Co Ltd v Mere Roihi* and *Tueh Guat Choo alias Tin Wat Choo v Cheah Ah Hoe and Yong Pow Meng*).
>
> (Emphasis added.)

[28] In another case *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, Raja Azlan Shah CJ (Malaya) at p 138 emphasised that:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. *Fraud must mean 'actual fraud ie, dishonesty of some sort' for which the registered proprietor is a party or privy*. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate: 'but 'fraud' ... implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.' (per Romilly MR in *Green v Nixon* [1957] 23 Bear 530 & 535; 53 ER 208. Thus in *Waimika Sawmilling Co Ltd v Waione Timber Co Ltd* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...

[29] Therefore on the record before this court, there is no evidence at all that plaintiff had committed actual fraud in the purchase of the said lands from Ng Kim Tin. Suspicion on the part of the defendant is no proof of fraud. In the light of all these authorities, the defendant's submission is totally devoid of merit as the defendant's allegations were merely based on her imaginary but groundless suspicion. The defendant has failed to prove fraud and the issue of lifting of the corporate veil and constructive trust are too remote in proving the defendant's caveatable interest.

CONCLUSION

[30] In this case it is crystal clear that the claim is a personal claim or better known as an in personam claim. The claim by the defendant is with regards to the profit obtaining or arising from the Taman Tiow Soon development project (the said project) whereby it is a monetary claim. The defendant's entitlement to the said profit is not a registrable interest as envisaged under s 323(1)(a) of the NLC and hence the defendant has no caveatable interest in the said lands. The defendant also has not proven that she is beneficially entitled under any trust under s 323(1)(b) of the NLC. In that light, this court will allow the application by the plaintiff under s 327 of the NLC to remove the six remaining caveats on the said lands. This court also allow the plaintiff's prayer under paras (b) for damages; (c) for a declaration that the defendant or its agent is prohibited from entering any further caveats upon the said lands under s 329(2) and (d) for cost of the application.

Plaintiff's application allowed.

Reported by Brendan Navin Siva